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STUDENT NOTES

PRIVILEGE AND MITIGATION OF DAMAGES IN DEFAMATION IN KENTUCKY

Libel and slander have been dealt with as twin torts for so long that a study of one almost of necessity includes a study of the other. That they differ in regard to the need to plead and prove damages is of only incidental interest in a discussion of privilege and mitigation of damages.

In the past it was customary to speak of the justification of a tort but the modern view is that there is no such thing as justifying a tort. Rather, one is said to have been privileged to act as he did. If he were not privileged, his act would be a tort but since he was privileged there was no tort and no liability Hence, in actions for slander or libel if the damaging statements are *true* there is no slander or libel, for these torts arise out of false statements only. However, courts continue to speak of justification and it is necessary to know what they mean by the term as well as to understand those situations which create a privilege in favor of the defendant.

TRUTH AS A DEFENSE

Truth is by far the most important defense to a suit for damages resulting from defamation.[1] If the defendant can prove that his statements were true the plaintiff cannot recover, no matter how much malice may have inspired them or how much damage has been done to his reputation. The Kentucky courts have affirmed this rule without exception. If the defendant has proved that the statements were true then a directed verdict is to be sustained. In *Herald Publishing Company v. Feltner*[3] the paper had printed a news item calling Feltner a "henchman of Hargis", "a fugitive from justice", and an "outcast" The court said that it was sufficient if the evidence proved that the descriptive words were suited to the plaintiff and that it was not necessary to prove that he was fleeing from a criminal prosecution. It was enough that he had disobeyed the orders of a court.

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[1] PROSSER, TORTS (1941) Sec. 95; Ray, *Truth a Defense to Libel* (1931) 16 Minn. Law Review 43.

[2] Vanover v Wells, 264 Ky 461, S.W (2d) 999 (1936), State Journal Co. v. Redding, 175 Ky 388, 194 S.W 301 (1917), Ray v Shamwell, 174 Ky 54, 191 S.W 622 (1917) The Courier-Journal Co. v. Phillips, 142 Ky 372, 134 S.W 446 (1906), Ratcliffe v Louisville Courier-Journal Co., 99 Ky. 416, 36 S.W 177 (1896), Vance v Louisville Courier-Journal Co., 95 Ky. 41, 23 S.W 591 (1893), Eastland v Caldwell, 5 Ky 21 (1810)

[3] 158 Ky 35, 164 S.W 370 (1914)

Substantial truth. As the Herald Publishing Company case indicates, the defendant need not prove the literal truth of every word. He is protected if he is able to prove that what he has said is substantially true. No definition of substantial truth is found in the Kentucky decisions but the courts could be said to require that the "gist" or "sting" of the defamation is true. It is sufficient if the gravamen of the charge is proved.[4]

In *Rollins v. Louisville Times Co.*[5] the defendant newspaper said that the grand jury had returned indictments against Rollins and that he had "left the country and his friends are unable to locate him." At the trial the plaintiff was able to prove that some of his friends knew of his whereabouts but the court said that this did not render the defendant's statement sufficiently untrue to defeat the plea of truth as a defense.

It is worthy of note that most of the cases allowing substantial truth as a complete defense are those involving newspapers in libel suits. It seems that the courts feel that the tempo of modern journalism makes such a rule necessary The Kentucky court has said, "We are not meaning to lay down the rule that newspapers should not be required to exercise due care in gathering and publishing public happenings " but "Newspapers are not to be held to the exact facts nor to the most minute details of the transactions they publish. What the law requires is that the publication be substantially true."[6] It could well be argued that this rule should be limited to newspapers and similar publications and that to escape liability a private individual should be held to a higher degree of truth.

A second complete defense is that the statements were made under circumstances which gave to the defendant the right to speak. This situation is said to create a *privilege.* Here again the criticism may be offered that if the defendant is privileged he is not guilty of slander or libel. Actually truth and privilege are pleas of not guilty rather than of confession and avoidance. As a matter of fact the plea of not guilty appears frequently in early tort cases, indicating the criminal origin of the offenses.

PRIVILEGED SITUATIONS AND PERSONS

There are two kinds of privilege: absolute and conditional.[7] In absolute privilege the defendant is not liable under any circumstances. He may have known that his statements were false. He may have been motivated by ill-will, and serious damage may have

[4] Vanover v. Wells, 264 Ky. 461, 94 S.W (2d) 999 (1936).
[5] 139 Ky. 788, 90 S.W 1081 (1906).
[6] State Journal Co. v. Redding, 175 Ky. 388 at 394, 194 S.W 301 at 303 (1917).
[7] Tanner v. Stevenson, 138 Ky. 578, 128 S.W 878 (1910).

been done to the plaintiff's reputation, still he is not liable. The Kentucky court confines absolute privilege to "judicial and legislative proceedings, matters involving military affairs, and communications made in the discharge of a duty under the express authority of law by or to heads of executive departments of the state."[8]

Gaines v. *Aetna Ins. Co.*[9] was a suit brought by one Gaines for libel based on the plea which the insurance company had entered in a previous suit in which he had sought to collect insurance on his burned barn. The insurance company's defense was that the plaintiff had deliberately burned the barn in order to collect the insurance. But the court said that " though the allegations were untrue, and were known to be untrue when made, and also conceding that they were made with bad motives, still for obvious grounds of public policy no action will lie therefor."[10] It is thought that a party to a suit should feel free to make any plea allowed to him by law and if this privilege is occasionally used as a protection for wrong-doing, more often it serves as a guarantee of fair trial. The court emphasized that the plea in the *Gaines* case was relevant, with the implication that if it had been irrelevant, the pleader would have been guilty of libel.

Nine years later the court left no doubt that the facts must be relevant. In *Sebree v. Thompson*[11] the defendant had testified in a previous trial that the plaintiff knew that the allegations made in his petition were untrue at the time he made and swore to it. This case is the authority for the rule in Kentucky that a party or witness, in order to be protected against suits for slander or libel, must limit his statements to matters relevant to the trial. The same limitation is placed on statements of counsel.[12]

It is generally recognized that when the protection and welfare of society require that a communication be made, a person is privileged to speak. In *Thompson* v. *Bridges et al,*[13] a parent-teacher association accused the school principal of immorality and the court affirmed that the members had a "vital public, moral and social interest" in the matter and that therefore "the occasion on which

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[8] Tanner v Stevenson, 138 Ky 578 at 585, 128 S.W 878 at 881 (1910)

[9] 104 Ky 695, 47 S.W 884 (1898)

[10] 104 Ky 695 at 698-99, 47 S.W 884 at 885 (1898)

[11] 126 Ky 223, 103 S. W 374 (1907) Note (1939) 27 Calif. Law Review 618.

[12] Smallwood v York, 163 Ky 139, 173 S.W 380 (1915), Schmitt v Mann, 291 Ky 80, 163 S.W (2d) 281 (1942), Nall v Phelps, 285 Ky 322, 147 S.W (2d) 1039 (1941) Reynolds v Evans et al., 244 Ky 267, 50 S.W (2d) 549 (1932), McAlister Co. v Jenkins, 214 Ky 802, 284 S.W 88 (1926) Lisanby v Illinois Central R.R. Co. 209 Ky 325, 272 S.W 753 (1925), Jaybee Jellico Coal Co. et al v Carter, 208 Ky 241, 270 S.W 768 (1925) Monroe v Davis, 118 Ky 806, 82 S.W 450 (1904)

[13] 209 Ky 710, 273 S.W 529 (1925)

the words were spoken was one giving rise to a qualified privilege."[14] Likewise a letter written to church members by one member about the character of another member was privileged.[15] But a non-Mason has been held not privileged to give an affidavit of character to be used at a Masonic trial.[16]

The relation of the parties is often the controlling factor. The local agent of a certain bonding company wrote to the state agent that the company had better not renew the plaintiff's bond because the plaintiff was a poor risk due to insanity in his family and that the plaintiff himself had done some things that "don't look exactly right" This was held to be a qualifiedly privileged communication and the plaintiff would have to prove actual malice in order to recover.[17] Many other relationships also give rise to a qualified privilege.[18]

The right to criticize public officials in their public capacity is deemed of such importance that fair and reasonable criticism is protected. But when the Louisville News Company published an article containing a charge that a judge was aiding in the prosecution of certain negroes and that they would be convicted and hanged under any circumstances, the court said: "The right to criticize does not embrace the right to make false statements of fact, or to draw inferences or express opinions not based on the truth "[19] and that the publishers were liable in that they had accused the judge of misconduct. Although this was a case of criminal libel, the rule is equally applicable to civil actions. So in an article concerning a certain session of the state legislature the defendant newspaper called the meeting "a disgraceful affair" and said that the plaintiff, a representative, had drawn a revolver and flashed a knife. The court said that the jury should have been instructed to find for the defendant if the statements were substantially true or if they were a reasonable and fair criticism, made in good faith and with-without malice.[20] Statements made concerning candidates for public

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[14] Thompson v Bridges et al, 209 Ky 710 at 713, 273 S.W 529 at 530 (1925)

[15] See Nix v Caldwell, 81 Ky. 293 at 299 (1883)

[16] Nix v Caldwell, 81 Ky 293 (1883)

[17] McClintock v McClure, 171 Ky 714, 188 S.W 167 (1916)

[18] School trustee to State Superintendent of Schools—Donham v. Dotson et al, 216 Ky 660, 288 S.W 297 (1926) credit-rating of plaintiff by credit association to members of the association—Ideal Motor Co. v Warfield, 211 Ky 576, 277 S.W 862 (1925), school president to parent of pupil—Basket, By, Etc. v R. N. Crossfield and Transylvania University, 190 Ky 751, 228 S.W 673 (1920) school trustee to county superintendent—Ranson v West, 125 Ky 459, 101 S.W 885 (1907), cashier's report in returning check as forged—Caldwell v Story, 107 Ky 10, 52 S.W 850 (1899)

[19] Cole v Commonwealth, 222 Ky 350 at 359, 300 S.W 907 at 911 (1927).

[20] Democrat Publishing Co. v Harvey, 181 Ky 730, 205 S.W 908 (1918) Evening Post Co. v Richardson, 113 Ky 641, 68 S.W

office are privileged, subject to the same limitations, that is, if they are substantially true or are fair and reasonable criticisms.[21]

Another frequent cause of libel suits is the publication of reports of judicial proceedings in newspapers. Although it has been said that newspapers as such have no particular privilege,[22] it is recognized that the publication of a report of a judicial, legislative, or executive proceeding, though containing false and defamatory matter, is privileged if it is accurate and complete or a fair abridgment of such proceedings and not made solely for the purpose of harming the person defamed.[23] Thus, it was held in *Beiser* v. *Scripps McRae Publishing Co.*[24] that the newspaper was privileged to publish the fact that one Guth had said that the plaintiff had taken his horse and impounded it in order to collect the fee, these words having been spoken before the justice of the peace in order to commence an action.

Other cases arise out of petitions and similar documents. In one case a judge of the county court wrote to a former foreman of the grand jury asking him to sign a petition to be used against the commonwealth's attorney Since impeachment proceedings are in the nature of judicial process, the judge had the right to enlist the aid of another, in good faith, on reasonable grounds.[25]

It is certain that in all of these cases the defendants were unable to prove the truth of their statements or they would have done so. Privilege is not as complete a defense as truth, for if the plaintiff is able to prove that the defendant has abused his privilege he can still recover. The qualified privilege serves to remove the presumption of malice[26] but the plaintiff may introduce affirmative evidence of personal malice and in support of his claim may use the fact that the statements were false and without probable cause.[27] It has been said that "When a person from malicious motives makes an attack upon the character of another, he puts himself beyond the protection that qualified privilege affords . . . "[28] and the judgment should be for the plaintiff.

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665 (1902) Vance v. Louisville Courier-Journal Co., 95 Ky 41, 23 S.W 591 (1893)

[21] Wernstein v Rhorer, 240 Ky 679, 42 S.W (2d) 892 (1931)

[22] Louisville Times Co. v Lyttle, 257 Ky 132, 77 S.W (2d) 432 (1934)

[23] RESTATEMENT, TORTS (1934) Sec. 611.

[24] 113 Ky 383, 68 S.W 457 (1902), CARDOZO, PARADOXES OF LEGAI SCIENCE (1928) p. 23.

[25] Young v Commonwealth, 135 Ky 207, 122 S.W 123 (1909), Stewart v. Hall, 83 Ky 375 (1885)

[26] Thompson v Bridges et al, 209 Ky 710, 273 S.W 529 (1925), McClintock v McClure, 171 Ky. 714, 188 S.W 167 (1916).

[27] Thompson v Bridges et al, 209 Ky. 710, 273 S.W 529 (1925).

[28] Tanner v Stevenson, 138 Ky. 578 at 589, 128 S.W 878 at 882 (1910).

MITIGATION OF DAMAGES

In addition to these complete defenses there are available to the defendant other partial defenses which, though not sufficient to render him not guilty, are sufficient to "palliate the wrong" and mitigate the damages.

Malice is said to be a necessary element in slander and libel. But malice, as used here, does not mean ill-will or intent to injure. It consists of nothing more than the doing of a wrongful act, and the intentional publication of a libel, however innocently is the only malice necessary.[29]

Although intent to injure is not necessary, the courts recognize certain defenses which, in so far as they tend to prove the absence of personal malice (ill-will) on the part of the defendant, will mitigate the damages. Considerable confusion results from the use of malice in two senses in the same opinion. It is something less than exact language to say that all the malice necessary is inferred and then to say that evidence proving that the defendant was not motivated "by malice" is admissible.

So in *Johnson v. Featherstone*[30] the defendant had charged the plaintiff with false swearing. The court said that certain testimony (to be considered later) should be admitted " as evidence of the animus of the defendant " and that "Malice can be proved only by circumstances generally "[31] This seems to say that the state of mind of the defendant is relevant, if not controlling.

There are a number of so-called defenses which the defendant is allowed to set up in order to rebut malice and so to mitigate the damages. They are:

Good faith of the defendant. If a publisher is able to prove that he honestly believed his statements true, the jury will be instructed to consider that fact in assessing damages against him.[32] An early Kentucky case held: "It can make no difference whether the defendant believed the libel to be true . . the injury consisted in the publication, not in the intent of the publisher, nor as to his belief or disbelief of the accusation."[33] This is perhaps the only case to this effect for a line of Kentucky decisions, before and after, have held to the contrary.

Thus the court in *Foster-Milburn Co.* v. *Chinn*[34] (an action for damages for a forged recommendation of a patent medicine) said

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[29] PROSSER, TORTS (1941) Sec. 93.
[30] 141 Ky. 793, 133 S.W 753 (1911).
[31] 141 Ky. 793 at 795, 133 S.W 753 at 754 (1911).
[32] Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W 364 (1909).
[33] Louisville Press Co. v. Tennelly, 20 K.L.R. 1231 at 1235, 49 S.W 15 at 17 (1899).
[34] 134 Ky. 424, 120 S.W 364 (1909).

that the jury should be instructed to consider, in mitigation of damages, the fact that the defendant published the letter innocently and in good faith, believing it to be genuine. So in an action against a newspaper the defendant was allowed to prove that the report was furnished by a reliable reporter of long experience, and that it was accepted and published in good faith as a news item.[35]

Repetition of Defamation—Rumor Although the defense that the defendant was only repeating what he "had heard" is not sufficient to prevent recovery yet *Marksberry v. Weir*[36] is authority for holding that such a defense may be made in mitigation because it would " tend to negative the charge of malice. " The defendant had said that the plaintiff, a professional tobacco grader, was representing both the buyer and the seller—which reflected on his qualifications in his profession—and was slanderous *per se*. The court said, "We do not understand that the rule admitting proof of this character should be confined to the mitigation of punitive damages alone. It should go to the mitigation of damages generally"[37] In his work on torts, Prosser indicates his approval of the Kentucky view but says that the greater number of courts hold that evidence bearing on malice should be limited to reducing punitive damages only[38]

Much earlier the Kentucky Court had said:

"But malice is the gist of the action of slander and the degree of responsibility must be proportioned to the malignity of the motives. Whatever, therefore, tends to diminish the malignity of the person who utters the slander must lessen the degree of responsibility· and most indisputably one who gives currency to a report already in existence cannot be guilty of the same degree of malignity as one who is the prime author. "[39]

The defendant may also show that there was a general rumor in the neighborhood to the same effect.[40] There is authority for saying that to couple a slander with "but I don't believe it" is without effect,[41] but the court has also said that it is always competent for the defendant to prove that he stated that he did not believe the report.[42]

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[35] Courier-Journal Co. v Phillips, 142 Ky 372 at 378, 134 S.W 446 at 448 (1911), Williams v Greenwade and Wife, 33 Ky 432 (1835)

[36] 173 Ky 316 at 321, 190 S.W 1108 at 1110 (1917)

[37] 173 Ky 316 at 321-22, 190 S.W 1108 at 1110 (1917)

[38] PROSSER, TORTS (1941) Sec. 95.

[39] James Calloway v Robert Middleton et ux, 9 Ky 372 at 373 (1820) Johnson v Featherstone, 141 Ky 793, 133 S.W 753 (1911) Parker v McQueen, 47 Ky 16 (1847) Williams v Greenwade and Wife, 33 Ky 432 (1835) Evans and Wife v Smith, 21 Ky. 363 (1827) CARDOZO, PARADOXES OF LEGAL SCIENCE (1928) p. 23.

[40] Reid v Sun Publishing Co., 158 Ky 727, 166 S.W 245 (1914)

[41] Nicholson v Merritt, 109 Ky 369, 59 S.W 25 (1900)

[42] Reid v Sun Publishing Co., 158 Ky 727 at 731, 166 S.W 245 at 247 (1914)

Provocation. The defendant is allowed to introduce evidence in mitigation showing that he had been provoked into making the statements. Thus a dictum in an 1837 case says: " ... had the plaintiff provoked the defendant by injurious acts or disparaging epithets, it seems to us that that circumstance might have been some palliation of the wrongful imputation then made by the defendant."[43] Anger and heat of passion are, however, not generally sufficient to warrant mitigation.[44] Thus in *Duncan v. Brown,*[45] the plaintiff was a witness to a certificate drawn up by a third person for the purpose of reflecting on the defendant. The defendant, in reply thereto, said that the plaintiff would put his name to anything another would ask him to sign. The court said that the law " pays some regard to the passions of men, and to that higher principle which compels a man to vindicate his own good character "[46] and that provocation, although insufficient to justify, may, by weakening malice, mitigate the damage. The defendant in *Deitchman v. Bowles*[47] also was allowed to show that his statement that the plaintiff had robbed his sister-in-law of three hundred dollars was made in the course of a hotly contested political campaign and in response to attacks made upon himself by the plaintiff at the same meeting.

Previous Reputation of the Plaintiff Evidence of the previous reputation of the plaintiff may be introduced by way of mitigation. This is for the purpose of showing that since the plaintiff's reputation was already bad, the defendant did no great harm. If this were limited to cases of slander other than language actionable without proof of damage, it would be understandable. But in *Eastland v. Caldwell*[48] the defendant had accused the plaintiff of stealing from him, and the court said:

"In the estimation of damages, the jury must take into consideration the general character of the plaintiff for a man who is habitually addicted to every vice, except the one with which he is charged is not entitled to as heavy damages as one possessing a fair moral character."[49]

So also in *Nicholson v. Merritt*[50] and *Vanover v. Wells,*[51] both cases in which the defendant accused the plaintiff of fornication and unchastity evidence of the previous reputation of the plaintiff was admitted in mitigation of damages.

Retraction. Since 1910 Kentucky has had a statute which pro-

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[43] Craig v Catlet, 35 Ky 323 at 323 (1837)
[44] Collins v Fenley, 7 K.L.R. 532 (1886) Vest v Norman, etc., 1 K.L.R. 317 (1880)
[45] 54 Ky 186 (1854)
[46] *Ibid.* at 198.
[47] 166 Ky 285, 179 S.W 249 (1915)
[48] 5 Ky. 21 (1810)
[49] *Ibid.* at 24.
[50] 109 Ky 369, 59 S.W 25 (1900)
[51] 264 Ky 461, 94 S.W (2d) 999 (1936)

vides that, in any civil action for libel, evidence is admissible as to whether or not the plaintiff requested a retraction and whether or not the defendant did, in fact, retract in the manner set out in the statute.[52] If the defendant has retracted, it is to be considered as evidence of absence of malice and avoids punitive damages. Whether or not it may be considered also in mitigation of compensatory damages is not clear and there seems to have been no decision on the point. However, it has been held that this section does not give the plaintiff the right to show the failure to retract in order to *recover* punitive damages but only confers on the defendant the right to show retraction in order to *defeat* at least punitive damages.[53] Prior to the statute the court had held that retraction "contributed little, if anything, toward repairing the wrong already inflicted."[54]

Thus, in Kentucky, the defendant in a defamation suit has three courses open to him. He may plead and prove that he was speaking the truth in which case he escapes all liability. Or he may claim that the situation in which he spoke created a privilege in his favor and that, therefore, even though the statements were false, the plaintiff may recover only if he can prove that the defendant exceeded his privilege or was motivated by ill-will.

In case he is unable to avail himself of either of the above defenses, he may seek to mitigate the damages by proving that he had not been motivated by ill-will or the intent to injure the plaintiff. This he may do by showing that he spoke in good faith, or that he merely repeated what he had heard and what was generally rumored in the neighborhood. Likewise, if he is able to prove that his statements were provoked by the defendant's actions or that he has retracted the defamation, he is entitled to have these facts considered by the jury when assessing the damages against him.

Indeed it is possible to conclude that the defendant is given a greater protection than he deserves and that it might well be argued that the defendant be required to prove, in addition to the above, that the defamation serves justifiable purposes.

ROSANNA A. BLAKE

THE ELEMENT OF SPECIFIC INTENT IN AGGRAVATED ASSAULT

At common law all assaults were misdemeanors.[1] An assault accompanied by aggravating circumstances, or committed with intent to commit a felony, as to murder or to rape, was not a distinct

[52] KRS 441.050.
[53] Reid v. Nichols, 166 Ky. 423, 179 S.W 440 (1915)
[54] Lehrer v. Elmore, 18 K.L.R. 551 at 555, 37 S.W 292 at 293-94 (1896)
[1] CLARK and MARSHALL, TREATISE ON THE LAW OF CRIMES (4th ed.) Sec. 191.